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SUPREME COURT, U.S.

No. 97-1962

In The

Supreme Court of the United States

October Term, 1997

SOUTHLAKE PROPERTY ASSOCIATES, LTD.,

Petitioner,

v.

CITY OF MORROW, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Morrow, Georgia sign ordinance violates the free speech clause of the First Amendment, applicable to the City of Morrow by virtue of the Fourteenth Amendment, by favoring commercial over noncommercial speech.

2. Whether the Court of Appeals, in construing the Morrow sign ordinance, erred in upholding the ordinance against a First Amendment challenge in light of the ordinance's overall statutory scheme, legislative history and past city practice, all of which demonstrated allowance of noncommercial messages unrelated to the premises on signage located in the city.

3. Whether legislative findings adopted with a substantial revision to the former Morrow sign ordinance and prior to initiation of any activity by Petitioner to erect signs within the City of Morrow are sufficient to determine the governmental purposes underlying the ordinance.

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CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

1. The legislative history of the sign ordinance of the City of Morrow, as it existed December 20, 1994 and as derived from the following ordinances[1] should be included with the constitutional provisions and ordinances cited by Petitioner:

Ord. 87-03, adopted May 26, 1987;

Ord. 88-07, adopted October 11, 1988;

Ord. 88-10, adopted November 8, 1988;

Ord. 91-08, adopted August 27, 1991;

Ord. 92-03, adopted February 11, 1992;

Ord. 92-10, adopted August 11, 1992;

Ord. 93-04, adopted June 22, 1993;

Ord. 93-06, adopted July 27, 1993;

Ord. 93-11, adopted October 26, 1993;

Ord. 94-02, adopted Feb. 8, 1994;

Ord. 94-04, adopted April 26, 1994.

STATEMENT OF THE CASE

This case involves a challenge under the First Amendment to the Morrow sign ordinance brought by a commercial entity seeking to erect billboard structures

[1] The ordinances cited above appear in the Stipulation of the Parties in Support of their Respective Motions for Summary Judgment. R2-21-Stipulation-Exhibit A.

within the City. Petitioner seeks to advance no particular message, but rather intends to rent space to various commercial entities for advertising.[2] The City of Morrow limits commercial signage to on-site advertising and further limits the number and size of allowable signs for businesses.

The City of Morrow first regulated commercial signage in 1974. The initial ordinance is not included in the record of this case, as a substantial rewrite of that ordinance occurred in 1987 readopting the signage chapter of the City Code in its entirety. R2-21-Stipulation-Exhibit A-2 to 17. The 1987 ordinance underwent a number of subsequent revisions, mostly minor, until April 26, 1994, when a major revision was performed as a result of litigation. *Id.* at 38 to 45. The April 26, 1994 revision included, for the first time, a detailed written statement of findings which set out the interests the City sought to protect. *Id.* at 38.

Petitioner's first approach to the City of Morrow occurred almost four months later, on or about August 15, 1994 when Petitioner's agent sought City certification that three billboard applications to the Georgia Department of Transportation met City ordinance standards. R2-22-Affidavit of Sibley-3. The City's Permits and

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[2] While Petitioner asserts in its Amended and Restated Complaint, among other places, that the messages which would be posted on its billboards would provide a medium for commercial, political and noncommercial speech (para. 11), the District Court Judge found that Petitioner's primary purpose and desire in erecting the signs is to profit commercially. (Petition, App., 15a, note 2)

Licenses Clerk declined to sign the certifications. While numerous reasons existed for her refusal to sign, one of the reasons was a city-wide prohibition of off-site commercial advertising and billboards. R3-27-Deposition of Bean-10 to 17.

Contrary to the Statement of Facts set out in the Petition for Writ of Certiorari, Georgia law does not permit erection of billboards in violation of City zoning or sign ordinances. Within the boundaries of cities such as Morrow, certification of compliance with local ordinances is a necessary part of the permitting process. Rules of the Georgia Dept. of Transportation, Section 672-6-.04(1)(e). R2-22-Plaintiff's Motion for Summary Judgment, Exhibit A-47.

The City has adopted a comprehensive system of sign control which limits the size and number of signs utilized for commercial purposes. While there are identifiable variations, the basic system provides that each business may maintain one building mounted and one free-standing sign. R2-21-Stipulation-Exhibit B. No similar restriction exists for residential properties. *Id*. Nor are residential signs prohibited. *Id*.

Off-premise commercial advertising is specifically prohibited by section 8-5-7(c): "No sign shall be erected or maintained for commercial purposes-except on the same lot on which the business, service or product is provided." *Id*. at Section 8-5-7(c). No parallel provision restricts noncommercial advertising. As will be argued fully in the next section, Petitioner's claims on page four of its statement of facts concerning (1) a purported ban on all noncommercial speech, and (2) the lack of a purpose

clause or preamble which would support a billboard ban, is a tortured reading of the text as well as a severe distortion of the facts as found by both the district and appellate courts.

Petitioner brought suit in the United States District Court, Northern District of Georgia, on December 20, 1994. R1-1. Cross motions for summary judgment were filed. R2-22, 23. Additionally, Petitioner moved to strike the affidavit of William Ross, an expert planner, who analyzed the effect of the City's sign restrictions on the City's stated twin goals of promoting aesthetics and traffic safety. R2-25. The motion to strike was denied. R3-32-18. No appeal was taken from that ruling.

In support of its motion for summary judgment, the City put forward a number of facts. In addition to the affidavit of Ross already described, the affidavit of Brenda Allen introduced into evidence factual support for the City's past issuance of noncommercial sign permits unrelated to the premises on-which the signage was located. R2-23-Affidavit of Allen. Deposition testimony was also introduced.

Other than the motion to strike, no attempt was made by Petitioner to refute any of the facts established by documents supporting the City's motion for summary judgment.

ARGUMENTS OF LAW AND CITATIONS OF AUTHORITY

Formulating arguments in this case is particularly difficult in that none of the issues raised in the Petition

for Writ of Certiorari have been raised in similar form in the courts below. Not only do the issues as stated by Petitioner severely distort existing rulings, they misstate unrefuted facts. Respondent is therefore left in a quandry. Should it unilaterally attempt to identify earlier enumerated error on which Respondent prevailed and which appears to underlie continuing arguments in the Petition? Or should it deviate from the record and follow Petitioner's invitation to argue new ground?

At the trial level, Petitioner raised five issues.[3] On appeal, the third issue was abandoned, leaving four remaining issues. The three questions presented by Petitioner now bear little resemblance to any issues earlier presented and decided. As has been stated on several occasions, it is this Court's practice to decline to review those issues neither pressed nor passed upon below. *FW/PBS, Inc. d/b/a Paris Adult Bookstore II v. City of Dallas*, 493 U.S. 215, 224 (1990); *Youakim v. Miller*, 425 U.S. 231, on remand 431 F.Supp. 40, affirmed 572 F.2d 483, probable

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[3] The five issues at the trial level were: (1) The Morrow sign ordinance is unconstitutional because it fails on its face to seek to implement a substantial governmental interest. (2) The Morrow Sign Ordinance is unconstitutional because it allows business and commercial signs in areas where noncommercial signs are prohibited and provides favorable treatment for business and commercial signs as opposed to noncommercial signs. (3) The Morrow sign ordinance is unconstitutional because it predetermines certain messages which may be posted without a permit, while requiring a permit for others. (4) The Morrow sign ordinance is unconstitutional because it impermissibly restricts the content of messages allowed to be placed on signs in residential zoning districts. (5) The entire sign ordinance should be stricken [as it cannot be severed].

jurisdiction noted, 434 U.S. 1060, affirmed 440 U.S. 125 (1976).

Nor does this case present novel questions the resolution of which will provide guidance to other circuits. The circuit court decision from which review is sought, like the district court decision below it, found the Morrow ordinance to be ambiguous. Both courts applied well accepted rules of construction and reached the same result, determining the ordinance to be constitutional. There is no indication from the cases cited by Petitioner, that had another circuit been provided with this case, on these facts, it would have reached a different decision.

Background

Both Petitioner and Respondent determined from the outset that the four-part test derived from *Central Hudson*[4] was the appropriate test against which to analyze the Morrow ordinance. Both the District Court and the Eleventh Circuit decisions utilized *Central Hudson* as the foundation against which to measure Morrow's ordinance. At no point in its Petition for Writ of Certiorari does Petitioner argue that *Central Hudson* is either irrelevant or in

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[4] The Court in *Central Hudson* ruled that a restriction on otherwise protected commercial speech is valid only if it: 1) concerns lawful activity and is not misleading, 2) seeks to implement a substantial governmental interest, 3) directly advances that interest, and 4) reaches no further than necessary to accomplish the given objective. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

need of further delineation by this Court. Nor does Petitioner argue that confusion surrounds the *Central Hudson* test or that a conflict exists among the circuits in how *Central Hudson* is viewed.

The *Central Hudson* decision utilizes a balancing test in commercial speech cases, requiring a government to set out the purposes of its regulations and then measure the fit between its purposes and the effect of the regulations.

The first prong of the *Central Hudson* test requires that the proposed speech concerns lawful activity and is not misleading. This prong is not at issue.

The second prong concerns articulation of a substantial governmental interest. In support of the second prong, the City of Morrow put forward two governmental interests: aesthetics and traffic safety. Both meet constitutional muster. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S.Ct. 2882, 2892-93, 69 L.Ed.2d 800 (1981) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further – traffic safety and the appearance of the city – are substantial governmental goals. It is far too late to contend otherwise . . . "). *Id.* at 507, 508.

Prior to suit being instituted, Morrow had substantially rewritten its sign ordinance. With the revision the City included a detailed Statement of Findings.[5] R2-21-

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[5] Section 1 of Ord. No. 94-04 reads as follows:

The Mayor and Council find that:

(a) The City of Morrow has had in effect a comprehensive sign ordinance since September 12, 1974, governing the

Stipulation-Exhibit A-38. These findings set out clearly and without dispute the governmental interests which the City sought to protect. *Id.* Recitation in the findings of an ordinance is sufficient to identify governmental purposes involved in adoption of that ordinance. *Supersign of Boca Raton, Inc. v. City of Ft. Lauderdale,* 766 F.2d 1528, 1529 (11th Cir. 1985). While Petitioner disputes the City had established its purposes, it has provided no evidence refuting the stated purposes or suggesting any improper motives by City officials.

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location, size and number of signs which can be erected in the City, such ordinance has its highest impact on commercial areas of the City;

(b) Said ordinance and its amendments have sought to ensure a balancing of the rights of individuals and businesses to make information available through signage with the rights of the public to clean, aesthetically pleasing, and safe business thoroughfares;

(c) As a result of its comprehensive sign regulatory scheme, commercial areas of the City of Morrow present an aesthetically pleasing environment which supports and promotes robust business activity within the City, as well as providing a zone for traffic substantially free of unsafe diversions;

(d) The intention of the City in its enforcement efforts has never been directed toward the content of advertising in the City;

(e) There nevertheless appear to be some ambiguities in the text of the ordinance which have resulted in confusion of the City's purposes by certain persons desirous of erecting signs within the City;

(f) It is the desire of the Mayor and Council of the City of Morrow to amend the terms of the ordinance so as to clarify its practice and procedures. R2-21-Stipulation-Exhibit A-38.

Prongs 3 and 4 of the *Central Hudson* test measure the "fit" between an ordinance and its espoused purposes. The Affidavit of William Ross, City Planner, shows that from a planning perspective the sign ordinance has been quite effective in limiting the overall number of signs within the City and with ensuring that messages on those signs are clearly visible and pose minimum confusion to motorists. R23-Affidavit of Ross-Exhibit B. Hence the City's expert found both goals to have been well met. *Id.* While Petitioner moved to strike the Affidavit of William Ross in the District Court, its motion was denied. No appeal was taken therefrom. Nor did Petitioner introduce any facts refuting the City's success in meeting its stated purposes.

The only relevant evidence before the District Court, therefore, was that a substantial fit existed between the legitimate articulated purposes of the ordinance and the manner in which the ordinance met those purposes.

The Morrow Ordinance Does Not Favor Commercial over Noncommercial Speech; The Ordinance Was Properly Upheld by the Eleventh Circuit.

Petitioner has alleged at each level of review that the Morrow ordinance impermissibly favors commercial over noncommercial speech. Petitioner looked to the definition of "billboard"[6] and concluded that due to the term's

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[6] Billboard is defined as an "advertising sign or a sign which advertises a commodity, product, place or thing, which is not located, found or sold on the premises upon which the sign is located; usually found along or near major roadways and of such size as to catch the attention of the motoring public and may sometimes be illuminated or animated."

definition, the ban on billboards includes a ban on all off-site commercial and noncommercial signs. (Petition, 4). Respondent introduced both factual evidence and arguments to the contrary.[7] The meaning of "billboard" is therefore at issue.

In attempting to analyze Petitioner's arguments, both the District Court and the Eleventh Circuit found the Morrow ordinance to be ambiguous, thereby necessitating construction. Petition, App. 12a, 21a. Where statutory terms are at issue, their interpretation is a question of law, and it is the Court's duty to define the appropriate standard. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314 (1995). Petitioner does not argue that construction is unnecessary; it simply argues that the Court reached the wrong result. By failing to challenge the Court's decision that construction of the term "billboard" is necessary, Petitioner is bound by that determination. *FW/PBS, Inc.* at 224.

The District Court's and Eleventh Circuit Court's ruling that the Morrow sign ordinance does not favor commercial speech is well supported by established principles of statutory construction concerning the ordinance taken as a whole, its legislative history, and the City's interpretation and practice concerning the ordinance's enforcement.

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[7] Respondent's factual evidence in support of its interpretation of billboard as prohibiting only off-premise commercial advertising included the City's past history in issuing permits for noncommercial signs which were unrelated to the premises on which the messages were displayed. R2-23-Affidavit of Allen-2, 3.

A statute is to be read as a whole, because the meaning of statutory language, plain or not, depends on context. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221, 112 S.Ct. 570, 574, 116 L.Ed.2d 578, (1991), on remand, 971 F.2d 641; *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991) (statutory language must always be read in its proper context); *Bailey v. U.S.*, ___ U.S. ___, 116 S.Ct. 501, 506, 133 L.Ed.2d 472 (1995), on remand, 1996 WL 103727 (in determining meaning of words used in a statute, court considers not only the bare meaning of the word, but also its placement and purpose in statutory scheme; a word's meaning, plain or not, depends on context).

The neutral context of the Morrow ordinance is clearly seen when compared with the provisions found defective in San Diego's ordinance in the *Metromedia* decision. The fatal flaw in San Diego's ordinance was that it limited permissible language on on-premise signs to commercial information: "Only those outdoor advertising display signs, hereinafter referred to as signs in this division, which are either signs designating the name of the owner or occupant of the premises; or signs advertising goods manufactured or produced, or services rendered on the premises upon which said signs are placed, shall be permitted." *Metromedia* at 806. This restriction was deemed to prohibit noncommercial messages, thereby favoring commercial over noncommercial speech and resulted in the ordinance being invalidated. *Metromedia* at 810.

By contrast, Morrow, in defining signage, includes no such content restriction. Permanent signage is defined to

include freestanding signs and wall signs. A "freestanding sign" is "a sign securely affixed to a steel support structure which is permanently attached to the ground and wholly independent of any building for support, such as monument or stanchion signs." R2-21-Stipulation-Exhibit B-Section 8-5-1(6). Similarly, a "wall sign" is defined as "a sign fastened, placed or painted upon, or parallel to the exterior wall of the structure itself, whether front, rear or side of the structure and which shall not exceed dimension and lighting restrictions imposed elsewhere in this chapter." R2-21-Stipulation-Exhibit B-Section 8-5-1(22). Morrow specifically prohibits all off-premise commercial advertising, R2-21-Stipulation-Exhibit B-Section 8-5-7(c), but includes no similar prohibition of noncommercial advertising.

The content neutrality of the Ordinance is further demonstrated when the legislative history of the ordinance is taken into consideration. As readopted in 1987, the Morrow sign ordinance allowed businesses to erect primary and secondary identification signs. Definitions of primary and secondary identification signs closely paralleled San Diego's invalid provisions. The definition for "primary identification sign" read: "A permanent freestanding sign (monument or stanchion) which has, as its purpose, to identify the business, premises or principal product or services obtainable on the premises where the sign is located." R2-21-Stipulation-Exhibit A-3. Similarly, the definition for "secondary identification sign" read: "A sign permanently affixed to the building wall or facia which has, as its purpose, to identify the business premises or principal product or service obtainable on the premises where the sign is located." R2-21-Stipulation-

Exhibit A-3. As initially enacted, therefore, the Morrow ordinance contained a similar defect as that identified in San Diego – on premise signage was limited to commercial speech only, locking out noncommercial expression. In that context, a billboard ban effectively cut off all forms of noncommercial communication through signage.

Unlike San Diego, however, Morrow amended its ordinance to remove content restrictions from "on-premise" signage. A business owner is free to include any message, so long as it (1) does not advertise commercial activity, products or services unrelated to the premises, (2) is not obscene, and (3) does not simulate an official traffic control or warning sign. R2-21-Stipulation-Exhibit B-Secs. 8-5-7(c), 8-5-9(b), 8-5-9(a).

Morrow's Mayor and Council, its legislative body, has therefore given a clear indication of its legislative intent. *Reves v. Ernst & Young*, 507 U.S. 170, 177, 113 S.Ct. 1163, 1169, 122 L.Ed.2d 525 (1993). When a legislature acts to amend its earlier statutes, the presumption is that it intends its amendment to have real and substantial effect. *Stone v. INS*, 514 U.S. 386, 115 S.Ct. 1537, 1545, 131 L.Ed.2d 465 (1995).

Moreover, Morrow's practice supports the interpretation given the meaning of the term "billboard" by the Court. Morrow documented a three year history of permitting noncommercial off-premise signs to be posted on commercial properties throughout the city. R2-23-Affidavit of Allen, 2, 3. In evaluating a facial challenge to the constitutionality of an ordinance, a reviewing court must consider the jurisdiction's own authoritative construction

of the ordinance, including its implementation and interpretation. *Forsyth County, Georgia v. Nationalist Movement*, 112 S.Ct. 2395, 120 L.Ed.2d 101, 111-112(1992), and must construe any ambiguity, if possible, in a manner which avoids any constitutional problems. *American Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir. 1990), cert. denied, 500 U.S. 942, 111 S.Ct. 2237, 114 L.Ed.2d 479 (1991); *see also EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981), cert. denied, 456 U.S. 905, 102 S.Ct. 1749, 72 L.Ed.2d 161 (1982) (quoting *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502, 99 S.Ct. 1313, 1320, 50 L.Ed.2d 533, 542 (1979)).

From the above discussion, it is clear that while the *Metromedia* decision was relevant to the facts of this case, and, in fact, was relied upon by both parties, it was not dispositive. Yet the Petition for Certiorari relies almost exclusively on *Metromedia* in seeking review of the case at bar, citing unparalleled confusion in existing case law applying that decision.

Merely citing a result, however, such as counting the number of ordinances which were upheld as opposed to the number of ordinances which were invalidated (Petition, 12), is unhelpful. Each case turns on its own facts. For sign cases, each case turns on its specific language and structure. In the case at bar, the determination by the Court that all noncommercial speech is on-site where generated by the speaker is not the holding, but rather a rationale underlying that holding. Where as in the case of the Morrow ordinance, construction is necessary to determine the reach of limiting provisions, the rationale will coincide with or follow the outcome of the construction.

A more helpful approach is to look at the overall statutory scheme of the ordinances or statute at issue. Those schemes which prohibit all signs, then allow for certain exemptions have frequently been invalidated. *See City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038 (1994) (ordinance prohibited all signs in residential areas except residence identification signs, for sale signs and signs warning of safety hazards); *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994) (state statute prohibited all signs on or within a certain distance of right-of-way of public highways, then exempted certain signs from the prohibition based on content); *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988) (in which the Court interpreted Orange's ordinance as prohibiting all signs unrelated to activity on the premises, but permitted a number of exemptions to the prohibition, the exemptions requiring the content of signs to be approved by the City); *Jackson v. City Council of Charlottesville*, 659 F.Supp. 470 (W.D.Va. 1987) (which banned all signs except those identified on premises upon which the sign was based, or advertising goods manufactured or produced for services rendered on the premises upon which signs were placed).

Conversely, ordinances which do not contain an outright prohibition or which prohibit signs without discrimination have been upheld. *See, e.g., Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (ordinance prohibiting posting of any signs on public property deemed constitutional).

The remaining case cited by Petitioner in support of its position is not to the contrary. *Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33 (1st

Cir. 1996) involved the interplay between a local ordinance and a state law. The Court found that the interplay between the two could not withstand constitutional challenge, even though it found the ordinance to be free of constitutional defects. *Id.* at 40.

Unlike *Ladue* and other decisions which have invalidated general prohibitions on signs while allowing enumerated exceptions, Morrow's ordinance contains no such prohibition. A prohibition can only be inferred by reading the definition of "billboard" to the exclusion of the remainder of the ordinance, an approach which the District Court and Eleventh Circuit properly declined to follow.

Legislative Findings Adopted by The City of Morrow in 1994 are Sufficient to Articulate the Governmental Purpose Underlying the Ordinance.

Petitioner specifically challenges the adoption of a Statement of Findings in 1994 as part of a comprehensive ordinance revision as sufficient to articulate a significant governmental interest under the *Central Hudson* test. Petitioner's argument in this regard has changed substantially over time. In its Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Petitioner flatly stated: "In enacting this restrictive regulation on free speech, the city has failed to identify any governmental interests which its regulation seeks to advance. Nowhere within the Morrow Sign Ordinance are there any purposes described forming the basis for the enactment of the city's ban on billboards or its other extensive regulations on signs." R2-22-Memorandum-5. "The City of Morrow has offered no justification for its broad-based

regulation of signs within the city. . . . Moreover, because the ordinance itself contains no statement of any substantial governmental interest it seeks to advance . . . " *Id.* at 8, 9.

Petitioner, Plaintiff below, totally ignored the Statement of Findings which were enacted with Ord. No. 94-04. The District Court, however, utilized those findings in its Order and distinguished Morrow's adoption, which had preceded Petitioner's approach to the City, from cases cited by the Petitioner in which justifications for the jurisdiction's ordinances were set out for the first time in arguments posed by attorneys during the course of litigation. (Petition, App., 19a, 20a).

Having lost its argument concerning lack of a significant governmental interest, Petitioner could have appealed the District Court's ruling as error, raising the argument now presented to this Court. What Petitioner did, however, was to approach the Eleventh Circuit with a sleight of hand. "The Morrow Sign ordinance contains no purpose clause or preamble to explain the basis for its restriction on speech." R-Brief of Appellant, 5. "Since the ordinance contains no preamble or purpose clause, the appellee and the district court relied upon certain 'findings' included within an amendment to the ordinance adopted on April 26, 1994, in an attempt to explain the substantial governmental interests sought to be implemented which the city contends vests it with the power to abridge its citizens' rights to free speech." *Id.* at 15. On appeal Petitioner characterized the findings as nothing more than after-the-fact conclusions regarding the initial 1974 enactment, *id.* at 17-20, a position which was seriously misleading, given the District Court's order.

Petitioner then took the position at oral arguments that the statement of purpose was added to the ordinance *after* it had applied for billboard permits, a position totally at odds with the written record. *Id.* at 5a. Not only did the Appellate Panel have to force a concession from Petitioner concerning the existence of the findings at oral arguments, *id.*, it had to force the admission that the ordinance preceded Petitioner's applications, the last concession leading to the footnote which appears at note 4 of the Circuit Court decision. *Id.* at 6a.

Petitioner now appears before this Court, having omitted the date on which it first sought City approval for its permits. In keeping attention focused backward over a 20 year span, Petitioner attempts to deflect attention, once again, from the fact that the findings were in place *prior to* Petitioner's approach to City officials. Further, Petitioner neglects to reference the facts, as found by the District Court through the uncontroverted admissible testimony of William F. Ross, which demonstrates that the fit required under *Central Hudson* between purpose and effect have been met. Petition, App., 20a, note 6. As authority for its arguments, Petitioner cites *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49, 105 S.Ct. 2265, 2280, 85 L.Ed.2d 652 (1985). The unsupported assertions referenced in *Zauderer*, however, were arguments first raised by counsel in the context of litigation. *Zauderer* holds no support for the supposition that findings enacted with an ordinance which precede an approval request under the ordinance are unsupported, after-the-fact articulations.

Respondents respectfully submit that this issue is inappropriate for appellate review. Petitioner's repeated

mischaracterization of clear documentary evidence and its failure to confront the lower court ruling head-on if it sought a change in the law should preclude any further consideration.

Public policy dictates that a legitimate articulated purpose must be upheld even if it comes chronologically late in an enactment's life. Following Petitioner's argument to its logical conclusion would mean that because Morrow had not initially articulated a purpose for its ordinance, it would be forever barred from doing so. Any attempt, therefore, by the City to regulate signage would be forever barred. From a public policy perspective, this argument has no merit. Regulation of signage is a legitimate governmental function. No retroactive application of the findings have been attempted. Rather the City asserts the findings to be prospective in nature and therefore applicable to this case since they were enacted prior to Petitioner's approach to the City.

Reasons for Denying Review by Certiorari.

Rule 10 of the Rules of the U.S. Supreme Court states, in part, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted *only* for *compelling* reasons." (emphasis added) No compelling reason exists in this case. The Court has stated repeatedly that commercial speech, while protected, is subject to a lesser degree of protection than noncommercial speech. *See, e.g., United States v. Edge Broadcasting Co.*, ___ U.S. ___, 113 S.Ct. 2696, 2703 (1993).

The interest which Petitioner seeks to protect in this instance is of even lesser status. Petitioner has no particular message it wishes to convey; rather it desires to erect physical structures, devoid of any message, in order to make money from the messages of other people, whatever those messages might be. While it is theoretically possible that the billboard structures could be used at some point in time to advertise a noncommercial message, testimony of Petitioner's agent at deposition made clear that Petitioner believed its client base would be primarily commercial and that it was his intent to make money. R2-24-Deposition of Anderson-6 to 24.

Petitioner's claim for hearing rests almost entirely on *Metromedia* and its progeny. Yet decision in this case did not turn on *Metromedia*, but on the *Central Hudson* analysis. The case could have been decided in the same fashion with the same analysis, even had *Metromedia* never existed.

But most importantly, this case rises and falls on the construction given one local ordinance by the Eleventh Circuit Court of Appeals. It is peculiarly tied to the ordinance's language and history. While the Eleventh Circuit decision is of utmost important to the parties in this case, there is little which would be usable as guidance to other jurisdictions across the United States which cannot be gleaned from a careful and responsible reading of existing sign case law.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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